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Federal Communications Commission
Office of the Secretary

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of Amendment of Parts 65 and 69 of the Commission's Rules to Reform the Interstate Rate of Return Represcription and Enforcement Processes	)	CC Docket No. 92-133

REPLY COMMENTS
of
LUFKIN-CONROE TELEPHONE EXCHANGE, INC.

Lufkin-Conroe Telephone Exchange, Inc. ("LCTX"), an independent local exchange carrier, hereby submits its reply comments with respect to the enforcement procedures under consideration in the captioned proceeding.

Introduction

LCTX supports the Commission's efforts to reduce the regulatory burdens that its represcription and enforcement processes impose upon small and mid-sized LECs remaining subject to rate of return regulation. Specifically, LCTX supports the Commission's proposal to repeal the automatic refund rule, which proposal has been opposed by MCI Telecommunications Corporation (MCI) in its initial comments. At the same time, LCTX opposes the Commission's apparent proposal to continue ordering refunds in the form of Section 208 "damages." Rather, the filed rate doctrine, Title II of the Communications Act, and equity and efficiency reasons require the Commission to enforce its rate of return prescription through the tariff review process only.

The Filed Rate Doctrine Prohibits The Commission From Ordering Refunds Of Properly Tariffed Rates

The courts have long and consistently held that regulated utilities must charge the rates set forth in tariffs filed with, and accepted or approved by, their governing agencies, and that agencies may not retroactively modify those rates. In Arizona Grocery Co. v. Atchison, Topeka and Santa Fe Railway Co., 284 U.S. 370, 390 (1932), the Supreme Court ruled that, once an agency has declared "the maximum reasonable rate to be charged by a carrier, it may not at a later time . . . subject a carrier which conformed thereto to the payment of reparation measured by what the Commission now holds it should have decided in the earlier proceeding to be a reasonable rate." The Supreme Court reiterated the filed rate doctrine in 1981, when it held that the Federal Energy Regulatory Commission (FERC) "may not impose a retroactive rate regulation and, in particular, may not order reparations." Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 578 (1981). See also Sea Robin Pipeline Company, 795 F. 2d 182, 189 (D.C. Cir. 1988) ("FERC may not order a retroactive refund based on a post hoc determination of the illegality of a filed rate's prescription.")

The Communications Act Expressly Limits The Commission's Authority To Refund Tariffed Charges

Title II of the Communications Act of 1934, as amended, strictly limits the Commission's authority to order refunds (or refunds in the guise of Section 208 "damages") of properly tariffed rates and charges that were not subject to a prior Section 204 suspension and accounting order.

Title II establishes two specific procedures for the Commission to employ in policing the rates and charges in common carrier tariffs. First, Section 204 gives the Commission authority (upon complaint or its own initiative) to investigate the lawfulness of proposed new or revised rates, to suspend such rates while they are investigated, and/or to allow such rates to go into effect at the end of the suspension period, subject to an accounting order permitting refund of any portion of the rates later found to be unjustified. This is the _only_ provision in Title II that authorizes refunds of tariffed rates and charges.

Where the lawfulness of an existing rate is in issue, a second provision -- Section 205 -- gives the Commission authority (again upon complaint or its own initiative) to investigate the rate and, if necessary, to prescribe the just and reasonable rate to be charged thereafter by the carrier. Section 205 provides only prospective relief, and gives the Commission no authority to order refunds or award "damages" with respect to previously collected rates and charges.

At paragraph 98 of its _Notice of Proposed Rulemaking and Order_ herein, the Commission cites _New England Telephone and Telegraph Co. v. FCC_, 826 F. 2d 1101 (D.C. Cir. 1987), as authority to order carriers to make refunds when they violate a rate of return prescription. However, that case was a split decision which dealt solely and entirely with a prospective rate adjustment. It did not involve, much less sanction, Commission grant of retroactive refunds or "damages." Moreover, in his dissent therein, Judge Buckley asserted that prospective rate adjustments based on past surpluses (rather than current market conditions) should be set aside because they contradicted the Commission's system of ratemaking as a forward-looking assessment of capital needs. Id. at 1112, 1117. Specifically, Judge Buckley found the Commission's rate of return process to consist of the following three coordinated powers to remedy excessive tariff rates: (1) the pre-filing establishment of target revenues; (2) the post-filing suspension and accounting order procedures of Section 204; and (3) the prospective rate adjustment powers of Section 205. Id. at 1113-14 and 1116-17. As Judge Buckley stated:

> The coordinated exercise of the agency authority in the first two stages in large measure eliminates the likelihood of overcharges. The option to reset future rates based on then-current conditions provides the vehicle to ensure that rates continue to be appropriate over time. Id. at 1114.

Subsequently, the District of Columbia Circuit has abandoned the majority position in New England Telephone, in favor of Judge Buckley's dissent. In AT&T v. FCC, 836 F. 2d 1386, 1390-91 (D.C. Cir. 1988), the court voided the Commission's prior automatic refund rule because it would require carriers to refund earnings above the target rate of return (plus buffer) for some periods, while not letting them recoup shortfalls in earnings during other periods -- thereby introducing a "systematic bias" that would guarantee carriers an economic loss in the long run. Judge Starr's concurring opinion in AT&T v. FCC emphasized that (except for the one special situation addressed in Section 204) Commission-ordered refunds violated the filed rate doctrine as well as prospective design of Title II of the Act. Id. at 1394.

Recently, in Illinois Bell Telephone Company v. FCC, No. 89-1365 (June 16, 1992), a unanimous D.C. Circuit panel held that the Commission has no statutory authority to order LECs to refund properly tariffed and collected access charges when the Commission has not previously conducted a Section 204 proceeding. The court expressly rejected the Commission's contention that Section 204 suspensions and accounting orders are optional, and indicated that "long distance carriers have no protection from excess access charges collected during the pendency of a § 205 proceeding." Slip opinion at 9-10.

The only other circuit court to consider the Commission's refund authority has also strictly limited it. In Ohio Bell Telephone Company v. FCC, 949 F.2d 864 (6th Cir. 1991), the court properly read the regulatory scheme of Title II as permitting both carriers and customers to rely upon tariffed rates once they are filed and allowed to go into effect, except for the special situation addressed by Section 204. Id. at 867. The court reasonably interpreted the Commission's prescribed rate of return as a target, and stated that "if a carrier is consistently earning in excess of the targeted rate of return, the Commission may use § 205 procedures to require the carrier to lower its rates." Id. It held that one-time refunds, like automatic refunds, are arbitrary, capricious and inconsistent with Commission rate of return policies because they require refunds of carrier overearnings, while ignoring underearnings. Id. at 873-74.

Public Policy Reasons Support Exclusive Reliance Upon The Tariff Review Process

Contrary to MCI's contentions (MCI Comments, p. 30), the "large number and relatively small size of most of the non-price cap LECs" will not make the tariff review process an "extremely unwieldy and inefficient [tool] for enforcing the ROR prescription against the non-price cap LECs." MCI ignores the fact that the vast majority of non-price cap LECs are issuing carriers with respect to the National Exchange Carrier Association (NECA) tariff. In actual fact, the Commission's staff has less than thirty access tariffs to review for the remaining rate of return LECs, and many of these cross-reference the NECA tariffs for some services.

Given the manageable number of rate of return LEC tariffs being filed with the Commission, the tariff review process is sufficient per se to enforce the Commission's rate of return prescription, and to protect the interests of LECs, inter-exchange carriers (IXCs) and the overall public. As indicated in Ohio Bell Telephone Co. v. FCC, supra at 867, the

Commission's prescribed rate of return should be treated as a "target." On the basis of each LEC's past performance (as evidenced by its FCC Form 492 reports) and its current tariff review plan and cost support, the Commission's Tariff Review Branch can determine whether the projections in access tariff filings are bona fide and reasonably calculated to achieve the target rate of return. When a carrier consistently earns in excess of the targeted rate of return, the Commission has clear statutory authority under Section 205 to require the carrier to lower its rates at any time -- either during the tariff review process or after the tariff is effective.

In contrast, automatic refunds and the formal complaint process destroy LEC financial planning, provide unwarranted windfalls to IXCs, and waste the Commission's administrative resources.

Small, non-price cap LECs urgently need financial stability and predictability. During this period of dramatic change in the telecommunications environment, they must make critical decisions whether to invest in digital technology, fiber optic facilities, Signalling System 7 networks, and other new facilities and services. Given their small, predominately rural subscriber bases, these LECs must walk a fine line in order to make the investments necessary to bring needed Information Age services to their subscribers without overextending their finances and being forced to substantially increase local service rates. In this environment, the possibility that the LEC may be required at some future date to refund previously collected revenues -- even though it had complied scrupulously with its filed rates during the period at issue -- could wreak havoc upon its financial and investment planning. In the end, local subscribers will pay -- in inferior facilities and services and/or in higher local service rates.

At the same time, automatic refunds and Section 208 "damages" give IXCs windfall profits which they do not appear to be passing through to their long distance customers. Whether these IXCs are price cap carriers like AT&T, or whether they are subject to forbearance regulation like MCI, they can reasonably be presumed to be incorporating the access charges they pay to non-price cap LECs into the rates they charge their long distance customers, plus making a return on these disbursements. If these IXCs are able to obtain refunds of access costs which they have already recovered from their own customers and if they do not pass these refunds through to their customers, they are essentially "double dipping" at the expense of their own customers.

Finally, the Commission's refund procedures, are presently wasting, and will continue to waste, the Commission's scarce administrative resources. The Commission is presently processing approximately three hundred Section 208 complaints from IXCs alleging LEC overearnings. The thousands of Commission man-hours being expended to handle these complaints would be much better used to bring new services to the public and to otherwise advance the Commission's critical programs. They are poorly spent in serving as a collection agent for IXCs which, by and large, made no prior attempt to challenge LEC access rates, in a timely and proper manner, during the tariff review process.

The automatic refund procedure advocated by MCI will not significantly reduce the drain on the Commission's administrative resources. Rather than providing automatic refunds through prospective rate reductions, MCI asks the Commission to "simply" require direct payments to access service customers (MCI Comments, p. 33). Implementation of such direct payments will be anything but "simple." As MCI concedes, there is no generally accepted method of computing the overall "automatic refund" because there is "no way of knowing, however, what the hypothetical 'full' rate would have been" (Id.). Nor is there a generally accepted, litigation-proof method for dividing the aggregate refund among a LEC's various IXC customers. Rather, MCI's direct payment plan can be expected to spawn numerous disputes which will ultimately come to the Commission for resolution.

Conclusion

The Commission can and should enforce its prescribed rate of return solely through the tariff review process. Its automatic refund and Section 208 "damages" alternatives violate the filed rate doctrine and the prospective design of

Title II of the Communications Act. In addition, they disrupt the financial and investment planning of small LECs, give unwarranted windfall profits to "double dipping" IXCs, and waste the Commission's scarce administrative resources. These latter alternatives should, therefore, be rejected.

Respectfully submitted,
LUFKIN-CONROE TELEPHONE EXCHANGE, INC.

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CERTIFICATE OF SERVICE

I, Kimberly Douglas, hereby certify that I am an employee in the Law Offices of Blooston, Mordkofsky, Jackson & Dickens and that on this 13th day of October, 1992 I mailed by first class United States mail, postage prepaid, a copy of the foregoing "**REPLY COMMENTS OF LUFKIN-CONROE TELEPHONE EXCHANGE, INC.**" to the following:

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